STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

The Evidence Code

Number 1—Evidence Code Revisions

October 1966

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

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NOTE

This pamphlet begins on page 101. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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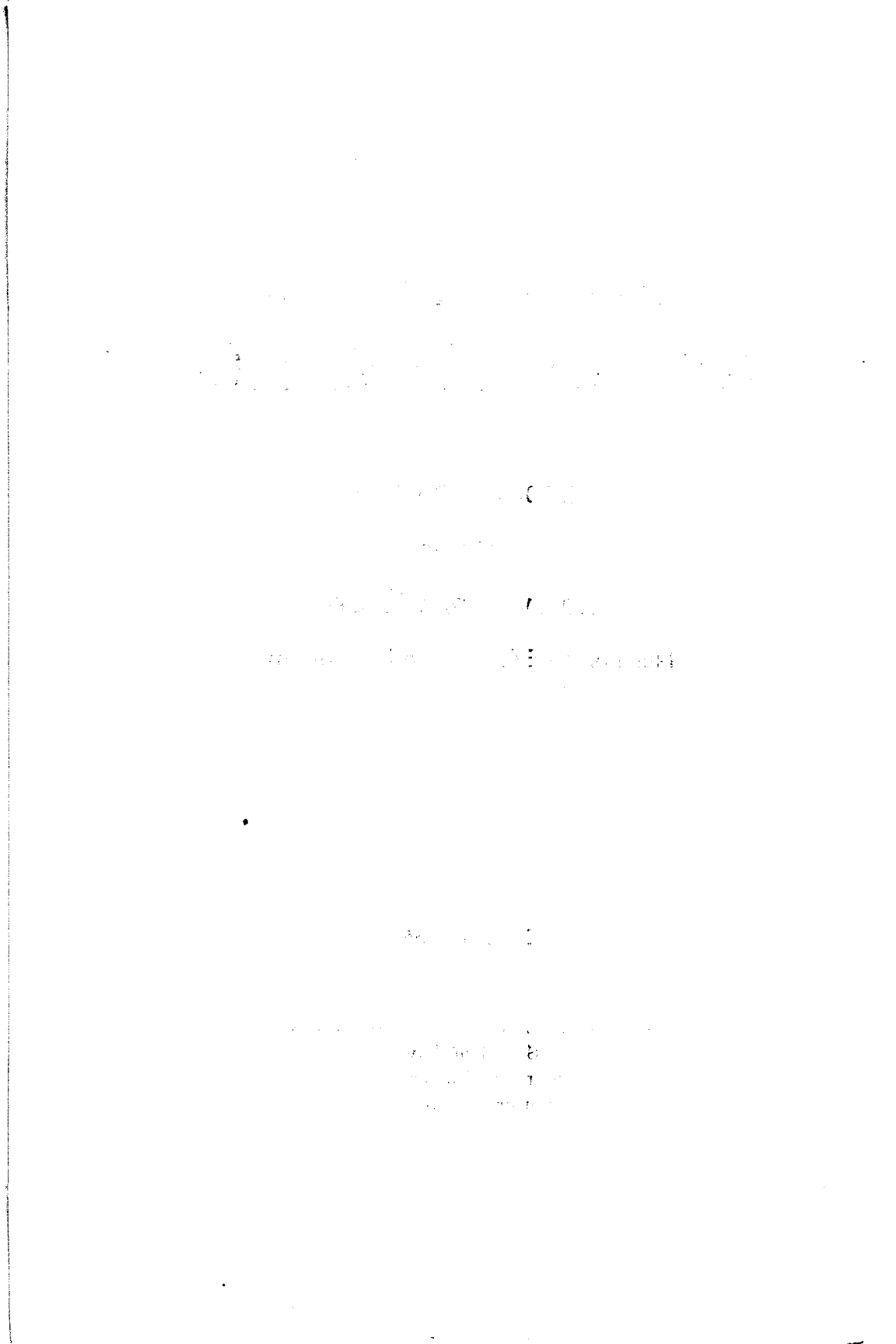

STATE OF CALIFORNIA EDMUND G. BROWN, Governor

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October 4, 1966

To His Excellency, Edmund G. Brown
Governor of California and
The Legislature of California

The Evidence Code was enacted in 1965 upon recommendation of the California Law Revision Commission.

Resolution Chapter 130 of the Statutes of 1965 directed the Commission to continue its study of the Evidence Code. Pursuant to this directive, the Commission has undertaken two projects:

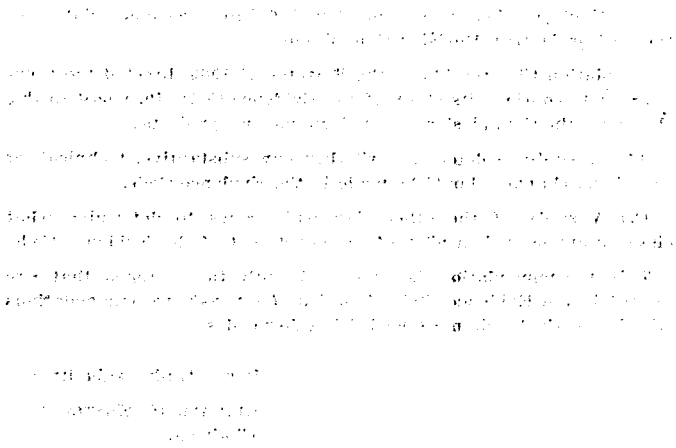
(1) A study to determine whether any substantive, technical, or clarifying changes should be made in the Evidence Code.

(2) A study of the other California codes to determine what changes are needed in view of the enactment of the Evidence Code.

This recommendation is concerned with the changes that are needed in the Evidence Code. A series of separate recommendations will deal with the changes needed in other codes.

Respectfully submitted,

Richard H. Keatinge
Chairman



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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Number 1—Evidence Code Revisions

BACKGROUND

In 1965, upon the recommendation of the Law Revision Commission, the Legislature enacted a new California Evidence Code. The effective date of the new code was postponed until January 1967 to give lawyers and judges an opportunity to become familiar with its provisions before they were required to apply them.

The Commission contemplated that, as lawyers and judges became familiar with the provisions of the Evidence Code, they would find some of its provisions in need of clarification or revision. The Commission has received and considered a number of suggestions relating to the new code. In the light of this consideration, the Commission makes the following recommendations concerning the Evidence Code.

RECOMMENDATIONS

Classification of Two Nonstatutory Presumptions

The Evidence Code divides rebuttable presumptions into two classifications and explains the manner in which each class affects the factfinding process. See EVIDENCE CODE §§ 600–607. Although several specific presumptions are listed and classified in the Evidence Code, the code does not codify most of the presumptions found in California statutory and decisional law; the Evidence Code contains only some of the statutory presumptions that were formerly found in the Code of Civil Procedure and a few common law presumptions that were identified closely with those statutory presumptions. Unless classified by legislation enacted for that purpose, the other presumptions will be classified by the courts as particular cases arise in accordance with the classification scheme established by the code.[1]

Thus, the Evidence Code does not contain any provisions dealing directly with the doctrine of res ipsa loquitur or the presumption of negligence that arises from proof of a violation of law. Because of the frequency with which the decision of cases requires the application

[1] The Law Revision Commission has undertaken a study of the California codes to determine what changes are needed in view of the enactment of the Evidence Code. The Commission plans to prepare legislation classifying the presumptions contained in the various codes as a part of this study. See *Recommendations Relating to the Evidence Code: Number 2—Agricultural Code Revisions; Number 3—Commercial Code Revisions*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 201, 301 (1967).

of these presumptions, however, the code should deal explicitly with them in the manner recommended below.

Res ipsa loquitur presumption. Prior to the effective date of the Evidence Code, the California courts held that the doctrine of res ipsa loquitur was an inference, not a presumption. But it was "a special kind of inference" whose effect was "somewhat akin to that of a presumption," for if the facts giving rise to the doctrine were established, the jury was required to find the defendant negligent unless he produced evidence to rebut the inference. *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954).

Under the Evidence Code, it seems clear that the doctrine of res ipsa loquitur is actually a presumption, for its effect as stated in the *Sherwin Williams* case is precisely the effect of a presumption under the Evidence Code when there has been no evidence introduced to overcome the presumed fact. See EVIDENCE CODE §§ 600, 604, 606, and the *Comments* thereto. It is uncertain, however, whether the doctrine is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence.

Prior to the effective date of the Evidence Code, the doctrine of res ipsa loquitur did not shift the burden of proof. The cases considering the doctrine stated, however, that it required the adverse party to come forward with evidence not merely sufficient to support a finding that he was not negligent but sufficient to balance the inference of negligence. See, *e.g.*, *Hardin v. San Jose City Lines, Inc.*, 41 Cal.2d 492, 497, 260 P.2d 63, 65 (1953). If such statements merely meant that the trier of fact was to follow its usual procedure in balancing conflicting evidence—*i.e.*, the party with the burden of proof wins on the issue if the inference of negligence arising from the evidence in his favor preponderates in convincing force, but the adverse party wins if it does not—then res ipsa loquitur in the California cases has been what the Evidence Code describes as a presumption affecting the burden of producing evidence. If such statements meant, however, that the trier of fact must in some manner weigh the convincing force of the adverse party's evidence of his freedom from negligence against the legal requirement that negligence be found, then the doctrine of res ipsa loquitur represented a specific application of the former rule (repudiated by the Evidence Code) that a presumption is "evidence" to be weighed against the conflicting evidence. See the *Comment* to EVIDENCE CODE § 600.

The doctrine of res ipsa loquitur, therefore, should be classified as a presumption affecting the burden of producing evidence in order to eliminate any uncertainties concerning the manner in which it will function under the Evidence Code. Such a classification will also eliminate any vestiges of the presumption-is-evidence doctrine that may now inhere in it. The result will be that, as under prior law, the finding of negligence is required when the facts giving rise to the doctrine have been established unless the adverse party comes forward with contrary evidence. If contrary evidence is produced, the trier of fact will then be required to weigh the conflicting evidence—deciding for the party relying on the doctrine if the inference of negligence preponderates in convincing force, and deciding for the adverse party if it does not.

This classification accords with the purpose of the doctrine. Like other presumptions affecting the burden of producing evidence, it is based on an underlying logical inference; and "evidence of the nonexistence of the presumed fact . . . is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence." *Comment* to EVIDENCE CODE § 603.

The requirement of the prior law that, upon request, an instruction be given on the effect of res ipsa loquitur is not inconsistent with the Evidence Code and should be retained. See *Bischoff v. Newby's Tire Service,* 166 Cal. App.2d 563, 333 P.2d 44 (1958); 36 CAL. JUR.2d *Negligence* § 340 at 79 (1957).

Presumption of negligence from violation of a statute. Under existing law, a presumption of negligence arises from proof of the violation of a statute, ordinance, or regulation. *Alarid v. Vanier,* 50 Cal.2d 617, 327 P.2d 897 (1958); *Tossman v. Newman,* 37 Cal.2d 522, 233 P.2d 1 (1951). Although some cases state that the violation must be one for which a criminal sanction is provided, cases may be found where the presumption has been invoked despite the lack of a criminal sanction for the violation. See *Cary v. Los Angeles Ry.,* 157 Cal. 599, 108 Pac. 682 (1910) (dictum); *Forbes v. Los Angeles Ry.,* 69 Cal. App.2d 794, 160 P.2d 83 (1945). *Cf. Clinkscales v. Carver,* 22 Cal.2d 72, 136 P.2d 777 (1943). In addition to the violation, the party relying on the presumption must show that he is one of the class of persons for whose benefit the statute, ordinance, or regulation was adopted, that the accident was of the nature the enactment was designed to prevent, and that the violation was the proximate cause of the damage or injury. See *Richards v. Stanley,* 43 Cal.2d 60, 271 P.2d 23 (1954); *Nunneley v. Edgar Hotel,* 36 Cal.2d 493, 225 P.2d 497 (1950).

Recent cases seem to indicate that the presumption is now treated as one that affects the burden of proof. In the *Alarid* case, the court stated that the correct test for determining whether the presumption has been overcome "is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." 50 Cal.2d 617, 624, 327 P.2d 897, 900 (1958). It has been held, however, that the presumption does not shift the burden of proof to the adverse party. *Jolley v. Clemens,* 28 Cal. App.2d 55, 82 P.2d 51 (1938).

The presumption should be classified as a presumption affecting the burden of proof in order to further the public policies expressed in the various statutes, ordinances, and regulations to which it applies.

Section 776

Section 776 permits a party to call the employee of an adverse party and examine that employee as if under cross-examination. This merely means that the examiner may use leading questions in his examination. EVIDENCE CODE § 767. The rule forbidding the impeachment of one's own witness has not been continued in the Evidence Code. See EVIDENCE CODE § 785. If the employer-party then chooses to cross-examine

the employee, the examination must be conducted as if it were a redirect examination, *i.e.*, the employer is ordinarily forbidden to use leading questions.

Under Code of Civil Procedure Section 2055, which Section 776 has superseded, the employer's examination of an employee examined by the adverse party could be conducted like a cross-examination. As a general rule, this provision of Section 2055 was undesirable, for it permitted an employer to lead an employee-witness even though the interests of the employer and employee were virtually identical. This provision of Section 2055 was of some merit, however, in litigation between an employer and an employee. An employee-witness who is called to testify against the employer by a co-employee may often be in sympathy with his co-worker's cause rather than his employer's. In such a case, the employer should have the right to ask the witness leading questions to the same extent that any other party can cross-examine an adverse witness.

Accordingly, Section 776 should be amended to restore to an employer-party the right to use leading questions in examining an employee-witness who is called by a co-employee to testify under Section 776.

Sections 952, 992, and 1012

The lawyer-client, physician-patient, and psychotherapist-patient privileges all protect "information transmitted" between the parties. EVIDENCE CODE §§ 952, 992, 1012. In addition, the physician-patient and psychotherapist-patient privileges protect "information obtained by an examination of the patient." EVIDENCE CODE §§ 992, 1012. It has been suggested that the quoted language may not protect a professional opinion or diagnosis that has been formed on the basis of the protected communications. If these sections were construed to leave such opinions and diagnoses unprotected, the privileges would be virtually destroyed. Therefore, Sections 952, 992, and 1012 should be amended to make it clear that such opinions and diagnoses are protected by these privileges.

Section 1017

Section 1017 of the Evidence Code provides that the psychotherapist-patient privilege is inapplicable if the psychotherapist is appointed by order of a court. As an exception to this general rule, Section 1017 provides that the privilege applies if the court appointment was made upon request of the lawyer for the defendant in a criminal case in order to provide the lawyer with information needed to advise the defendant whether to enter a plea based on insanity or to present a defense based on his mental or emotional condition.

It should make no substantive difference whether an insanity plea was made before or after the request for appointment. If the defense of insanity is presented, there is no psychotherapist privilege. EVIDENCE CODE § 1016. If the defense of insanity is not presented, the defendant is in the same position that he would be in if no plea of insanity were ever made, and he should have available to him any privileges that would have been applicable if no such plea had been made. Accordingly, Section 1017 should be amended so that the exception for a court-

appointed psychotherapist is not applicable where the appointment was made upon request of the lawyer for a criminal defendant in order to provide the lawyer with information needed to advise the defendant whether to withdraw a plea based on insanity.

Section 1152

Section 1152 provides that offers to compromise claims for loss or damage, and statements made in the course of negotiations for the settlement of claims for loss or damage, are inadmissible. The language of the section is so worded that it could be construed to refer to negotiations concerning past injuries only. The section, therefore, should be clarified to make clear that it refers to negotiations of claims for a loss or damage yet to be sustained as well as to those for a loss or damage previously sustained.

Section 1201

Section 1201 provides for the admission of "multiple hearsay." The section should be revised to clarify its meaning.

Section 1600

Section 1600 provides that the official record of a document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and of its execution and delivery by each person by whom it purports to have been executed. The section recodifies a presumption formerly found in Code of Civil Procedure Section 1951, but it does not classify the presumption as affecting either the burden of producing evidence or the burden of proof.

The presumption should be classified as a presumption affecting the burden of proof. This classification is consistent with the prior case law. See *Thomas v. Peterson,* 213 Cal. 672, 3 P.2d 306 (1931); *DuBois v. Larke,* 175 Cal. App.2d 737, 346 P.2d 830 (1959); *Osterberg v. Osterberg,* 68 Cal. App.2d 254, 156 P.2d 46 (1945). It tends to support the record title to property by requiring the record title to be sustained unless the party attacking that title can actually prove its invalidity.

Section 1602

Section 1602 recodifies the provisions of former Section 1927 of the Code of Civil Procedure. It prescribes the evidentiary effect of certain recitals in patents for mineral lands within California. The section should be relocated in the Public Resources Code so that it will appear among other statutory provisions relating to specific evidentiary problems involving mining claims.

The section states that a recital in a patent of the date of the location of the claim upon which the patent is based is "prima facie evidence" of that date. The purpose for the enactment of the section is not clear, but it seems probable that the section was designed to provide a means for proving an ancient location date where the lapse of time has precluded proving the date in any other way. The California Supreme Court had previously stated that such recitals were

inadmissible to prove the date of location. See *Champion Mining Co. v. Consolidated Wyo. Gold Mining Co.*, 75 Cal. 78, 81–83, 16 Pac. 513, 515 (1888). The section should be revised to provide a presumption affecting the burden of producing evidence. Thus, if evidence of a contrary location date is produced, the presumptive effect of such a recital will vanish. It would be inappropriate to permit such recitals to affect the burden of proof because they may be based on the self-serving statements of the patentee. See *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co.*, 196 U.S. 337 (1905).

Section 1603

Section 1603 recodifies former Code of Civil Procedure Section 1928. Prior to the enactment of Code of Civil Procedure Section 1928 in 1911, the recitals in a sheriff's deed, made pursuant to legal process, could not be used as evidence of the judgment or the execution and the sale upon which the deed was based. The existence of the prior proceedings were required to be proved with independent evidence. *Heyman v. Babcock*, 30 Cal. 367, 370 (1866); *Hihn v. Peck*, 30 Cal. 280, 287–288 (1866). The enactment of the predecessor of Evidence Code Section 1603 had two effects. First, it obviated the need for such independent proof. See, *e.g.*, *Oakes v. Fernandez*, 108 Cal. App.2d 168, 238 P.2d 641 (1951); *Wagnor v. Blume*, 71 Cal. App.2d 94, 161 P.2d 1001 (1945). See also BASYE, CLEARING LAND TITLES § 41 (1953). Second, it obviated the need for proof of a chain of title prior to the execution of the deed. *Krug v. Warden*, 57 Cal. App. 563, 207 Pac. 696 (1922).

The presumption now stated in Section 1603 should be classified as a presumption affecting the burden of proof in order to carry out the purpose of the original section and further its purpose of supporting the record chain of title.

Section 1605

Section 1605 is a recodification of former Code of Civil Procedure Section 1927.5. That section originally appeared as Section 5 of Chapter 281 of the Statutes of 1865-66 and was codified as part of the Code of Civil Procedure in 1955.

Chapter 281 of the Statutes of 1865–66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865–66 statute provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule—which would have required production of the original or an excuse of its nonproduction before the recorded copy could be admitted—

and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy. Section 1605, therefore, should be revised to reflect this original purpose.

Sections 412 and 413

Sections 412 and 413 authorize the trier of fact, in determining what inferences to draw from the evidence, to consider the failure of a party to explain or deny the evidence or facts in the case against him, his willful suppression of evidence, or his production of weaker evidence when it was within his power to have produced stronger.

In *Griffin v. California*, 380 U.S. 609 (1965), the United States Supreme Court held that comment by the court or counsel upon a criminal defendant's failure to produce or explain evidence, when such failure is predicated on an assertion of the constitutional right of a person to refuse to testify against himself, violates the defendant's rights under the 14th Amendment of the United States Constitution.

The Commission considered revising Sections 412 and 413 to indicate the nature of the constitutional limitation on the rules they express. The Commission determined to make no recommendation in this regard, however, for the extent of the constitutional limitation is as yet uncertain. Moreover, all sections in the code, not merely these two sections, are subject to whatever constitutional limitations may be found applicable in the particular situations where they are applied. An amendment of these sections providing that they are subject to a constitutional limitation in a particular situation would merely state a truism.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Sections 776, 952, 992, 1012, 1017, 1152, 1201, 1600, 1603, and 1605 of, to add Sections 646 and 669 to, and to repeal Section 1602 of, the Evidence Code, and to add Section 2325 to the Public Resources Code, relating to evidence.

The people of the State of California do enact as follows:

Evidence Code Section 646 (new)

SECTION 1. Section 646 is added to the Evidence Code, to read:

646. The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. If the party against whom the presumption operates introduces evidence which would support a finding that he was not negligent, the court may, and on request shall, instruct the jury as to any inference that it may draw from such evidence and the facts that give rise to the presumption.

Comment. Section 646 is designed to clarify the manner in which the doctrine of res ipsa loquitur functions under the provisions of the Evidence Code relating to presumptions.

The doctrine of res ipsa loquitur, as developed by the California courts, is applicable in an action to recover damages for negligence when the plaintiff establishes three conditions:

> "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." [*Ybarra v. Spangard,* 25 Cal.2d 486, 489, 154 P.2d 687, 689 (1944).]

Section 646 provides that the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. Therefore, when the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find the defendant negligent unless he comes forward with evidence that would support a finding that he exercised due care. EVIDENCE CODE § 604. Under the California cases, such evidence must show either that a specific cause for the accident existed for which the defendant was not responsible or that the defendant exercised due care in all respects wherein his failure to do so could have caused the accident. See, *e.g., Dierman v. Providence Hosp.,* 31 Cal.2d 290, 295, 188 P.2d 12, 15 (1947). If evidence is produced that would support a finding that the defendant exercised due care, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference of negligence from the facts that gave rise to the presumption. See EVIDENCE CODE § 604 and the *Comment* thereto. In rare cases, the defendant may produce such conclusive evidence that the inference of negligence is dispelled as a matter of law. See, *e.g., Leonard v. Watsonville Community Hosp.,* 47 Cal.2d 509, 305 P.2d 36 (1956). But, except in such a case, the facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared.

To assist the jury in the performance of its factfinding function, the court may instruct that the facts that give rise to res ipsa loquitur are themselves circumstantial evidence of the defendant's negligence from which the jury can infer that he failed to exercise due care. Section 646 requires the court to give such an instruction when a party so requests. Whether the jury should draw the inference will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more likely than not that the defendant was negligent.

At times the doctrine of res ipsa loquitur will coincide in a particular case with another presumption or with another rule of law that requires the defendant to discharge the burden of proof on the issue. See Prosser, *Res Ipsa Loquitur in California,* 37 CAL. L. REV. 183 (1949). In such cases the defendant will have the burden of proof on issues where res ipsa loquitur appears to apply. But because of the allocation of the burden of proof to the defendant, the doctrine of res

ipsa loquitur will serve no function in the disposition of the case. However, the facts that would give rise to the doctrine may nevertheless be used as circumstantial evidence tending to rebut the evidence produced by the party with the burden of proof.

For example, a bailee who has received undamaged goods and returns damaged goods has the burden of proving that the damage was not caused by his negligence unless the damage resulted from a fire. See discussion in *Redfoot v. J. T. Jenkins Co.*, 138 Cal. App.2d 108, 112, 291 P.2d 134, 135 (1955). See COM. CODE § 7403 (1)(b). Where the defendant is a bailee, proof of the elements of res ipsa loquitur in regard to an accident damaging the bailed goods while they were in the defendant's possession places the burden of proof—not merely the burden of producing evidence—on the defendant. When the defendant has produced evidence of his exercise of care in regard to the bailed goods, the facts that would give rise to the doctrine of res ipsa loquitur may be weighed against the evidence produced by the defendant in determining whether it is more likely than not that the goods were damaged without fault on the part of the bailee. But because the bailee has both the burden of producing evidence and the burden of proving that the damage was not caused by his negligence, the presumption of negligence arising from res ipsa loquitur cannot have any effect on the proceeding.

Effect of the Failure of the Plaintiff to Establish All the Preliminary Facts That Give Rise to the Presumption

The fact that the plaintiff fails to establish all of the facts giving rise to the res ipsa presumption does not necessarily mean that he has not produced sufficient evidence of negligence to sustain a jury finding in his favor. The requirements of res ipsa loquitur are merely those that must be met to give rise to a compelled conclusion (or presumption) of negligence in the absence of contrary evidence. An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. See Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 So. CAL. L. REV. 459 (1937). In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more likely than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine.

Examples of Operation of Res Ipsa Loquitur Presumption

The doctrine of res ipsa loquitur may be applicable to a case under four varying sets of circumstances:

(1) Where the facts giving rise to the doctrine are established as a matter of law (by the pleadings, by stipulation, by pretrial order, or by some other means) and there is no evidence sufficient to sustain a finding that the defendant was not negligent.

(2) Where the facts giving rise to the doctrine are established as a matter of law, but there is evidence sufficient to sustain a finding of some cause for the accident other than the defendant's negligence or evidence of the defendant's exercise of due care.

(3) Where the defendant introduces evidence tending to show the nonexistence of the essential conditions of the doctrine but does not introduce evidence to rebut the presumption.

(4) Where the defendant introduces evidence to contest both the conditions of the doctrine and the conclusion that his negligence caused the accident.

Set forth below is an explanation of the manner in which Section 646 functions in each of these situations.

Basic facts established as a matter of law; no rebuttal evidence. If the basic facts that give rise to the presumption are established as a matter of law (by the pleadings, by stipulation, by pretrial order, etc.), the presumption requires that the jury find that the defendant was negligent unless and until evidence is introduced sufficient to sustain a finding either that the accident resulted from some cause other than the defendant's negligence or that he exercised due care in all possible respects wherein he might have been negligent. When the defendant fails to introduce such evidence, the court must simply instruct the jury that it is required to find that the defendant was negligent.

For example, if a plaintiff automobile passenger sues the driver for injuries sustained in an accident, the defendant may determine not to contest the fact that the accident was of a type that ordinarily does not occur unless the driver was negligent. Moreover, the defendant may introduce no evidence that he exercised due care in the driving of the automobile. Instead, the defendant may rest his defense solely on the ground that the plaintiff was a guest and not a paying passenger. In this case, the court should instruct the jury that it must assume that the defendant was negligent. *Cf. Phillips v. Noble,* 50 Cal.2d 163, 323 P.2d 385 (1958); *Fiske v. Wilkie,* 67 Cal. App.2d 440, 154 P.2d 725 (1945).

Basic facts established as matter of law; evidence introduced to rebut presumption. Where the facts giving rise to the doctrine are established as a matter of law but the defendant has introduced evidence either of his due care or of a cause for the accident other than his negligence, the presumptive effect of the doctrine vanishes. In most cases, however, the basic facts will still support an inference that the defendant's negligence caused the accident. In this situation the court may instruct the jury that it may infer from the established facts that negligence on the part of the defendant was a proximate cause of the accident. The court is required to give such an instruction when requested. The instruction should make it clear, however, that the jury should draw the inference only if, after weighing the circumstantial evidence of negligence together with all of the other evidence in the case, it believes that it is more likely than not that the accident was caused by the defendant's negligence.

Basic facts contested; no rebuttal evidence. The defendant may attack only the elements of the doctrine. His purpose in doing so would be to prevent the application of the doctrine. In this situation, the court cannot determine whether the doctrine is applicable or not because the

basic facts that give rise to the doctrine must be determined by the jury. Therefore, the court must give an instruction on what has become known as conditional res ipsa loquitur.

Where the basic facts are contested by evidence, but there is no rebuttal evidence, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the defendant was negligent.

Basic facts contested; evidence introduced to rebut presumption. The defendant may introduce evidence that both attacks the basic facts that underlie the doctrine of res ipsa loquitur and tends to show that the accident was not caused by his failure to exercise due care. Because of the evidence contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence.

In this situation, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it may infer from those facts that the accident was caused because the defendant was negligent. The jury should draw the inference, however, only if it believes after weighing all of the evidence that it is more likely than not that the defendant was negligent and the accident actually resulted from his negligence.

Evidence Code Section 669 (new)

SEC. 2. Section 669 is added to the Evidence Code, to read:

669. (a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or

(2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Comment. Section 669 codifies a common law presumption that is frequently applied in the California cases. See *Alarid v. Vanier,* 50

Cal.2d 617, 327 P.2d 897 (1958). The presumption may be used to establish a plaintiff's contributory negligence as well as a defendant's negligence. *Nevis v. Pacific Gas & Elec. Co.,* 43 Cal.2d 626, 275 P.2d 761 (1954).

Effect of Presumption

If the conditions listed in subdivision (a) are established, a presumption of negligence arises which may be rebutted by proof of the facts specified in subdivision (b). The presumption is one of simple negligence only, not gross negligence. *Taylor v. Cockrell,* 116 Cal. App. 596, 3 P.2d 16 (1931).

Section 669 appears in Article 4 (beginning with Section 660), Chapter 3, of Division 5 of the Evidence Code and, therefore, is a presumption affecting the burden of proof. EVIDENCE CODE § 660. Thus, if it is established that a person violated a statute under the conditions specified in subdivision (a), the opponent of the presumption is required to prove to the trier of fact that it is more probable than not that the violation of the statute was reasonable and justifiable under the circumstances. See EVIDENCE CODE § 606 and the *Comment* thereto. Since the ultimate question is whether the opponent of the presumption was negligent rather than whether he violated the statute, proof of justification or excuse under subdivision (b) negates the existence of negligence instead of merely establishing an excuse for negligent conduct. Therefore, if the presumption is rebutted by proof of justification or excuse under subdivision (b), the trier of fact is required to find that the violation of the statute was not negligent.

Violations by children. Section 669 applies to the violation of a statute, ordinance, or regulation by a child as well as by an adult. But in the case of a violation by a child, the presumption may be rebutted by a showing that the child, in spite of the violation, exercised the care that children of his maturity, intelligence, and capacity ordinarily exercise under similar circumstances. *Daun v. Truax,* 56 Cal.2d 647, 16 Cal. Rptr. 351, 365 P.2d 407 (1961). However, if a child engages in an activity normally engaged in only by adults and requiring adult qualifications, the "reasonable" behavior he must show to establish justification or excuse under subdivision (b) must meet the standard of conduct established primarily for adults. *Cf. Prichard v. Veterans Cab Co.,* 63 Cal.2d 727, 47 Cal. Rptr. 904, 408 P.2d 360 (1965) (minor operating a motorcycle).

Failure to establish conditions of presumption. Even though a party fails to establish that a violation occurred or that a proven violation meets all the requirements of subdivision (a), it is still possible for the party to recover by proving negligence apart from any statutory violation. *Nunneley v. Edgar Hotel,* 36 Cal.2d 493, 225 P.2d 497 (1950) (plaintiff permitted to recover even though her injury was not of the type to be prevented by statute).

Functions of Judge and Jury

If a case is tried without a jury, the judge is responsible for deciding both questions of law and questions of fact arising under Section 669. However, in a case tried by a jury, there is an allocation between the judge and jury of the responsibility for determining the existence or

nonexistence of the elements underlying the presumption and the existence of excuse or justification.

Subdivision (a), paragraphs (3) and (4). Whether the death or injury involved in an action resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent (paragraph (3) of subdivision (a)) and whether the plaintiff was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted (paragraph (4) of subdivision (a)) are questions of law. *Nunneley v. Edgar Hotel,* 36 Cal.2d 493, 225 P.2d 497 (1950) (statute requiring parapet of particular height at roofline of vent shaft designed to protect against walking into shaft, not against falling into shaft while sitting on parapet). If a party were relying solely on the violation of a statute to establish the other party's negligence or contributory negligence, his opponent would be entitled to a directed verdict on the issue if the judge failed to find either of the above elements of the presumption. See *Nunneley v. Edgar Hotel,* 36 Cal.2d 493, 225 P.2d 497 (1950) (by implication).

Subdivision (a), paragraphs (1) and (2). Whether or not a party to an action has violated a statute, ordinance, or regulation (paragraph (1) of subdivision (a)) is generally a question of fact. However, if a party admits the violation or if the evidence of the violation is undisputed, it is appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law. *Alarid v. Vanier,* 50 Cal.2d 617, 327 P.2d 897 (1958) (undisputed evidence of driving with faulty brakes).

The question of whether the violation has proximately caused or contributed to the plaintiff's death or injury (paragraph (2) of subdivision (a)) is normally a question for the jury. *Satterlee v. Orange Glenn School Dist.,* 29 Cal.2d 581, 177 P.2d 279 (1947). However, the existence or nonexistence of proximate cause becomes a question of law to be decided by the judge if reasonable men can draw but one inference from the facts. *Satterlee v. Orange Glenn School Dist.,* 29 Cal.2d 581, 177 P.2d 279 (1947). See also *Alarid v. Vanier,* 50 Cal.2d 617, 327 P.2d 897 (1958) (defendant's admission establishes proximate cause); *Moon v. Payne,* 97 Cal. App.2d 717, 218 P.2d 550 (1950) (failure to obtain permit to burn weeds not proximate cause of child's burns).

Subdivision (b). Normally, the question of justification or excuse is a jury question. *Fuentes v. Panella,* 120 Cal. App.2d 175, 260 P.2d 853 (1953). The jury should be instructed on the issue of justification or excuse whether the excuse or justification appears from the circumstances surrounding the violation itself or appears from evidence offered specifically to show justification. *Fuentes v. Panella,* 120 Cal. App.2d 175, 260 P.2d 853 (1953) (instruction on justification proper in light of conflicting testimony concerning violation itself and surrounding circumstances). However, an instruction on the issue of excuse or justification should not be given if there is no evidence that would sustain a finding by the jury that the violation was excused. *McCaughan v. Hansen Pac. Lumber Co.,* 176 Cal. App.2d 827, 833-834, 1 Cal. Rptr. 796, 800 (1959) (evidence went to contributory negligence, not to excuse); *Fuentes v. Panella,* 120 Cal. App.2d 175, 260 P.2d 853 (1953) (dictum).

Evidence Code Section 776 (amended)

SEC. 3. Section 776 of the Evidence Code is amended to read:

776. (a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but, *subject to subdivision (e),* the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

(e) Paragraph (2) of subdivision (b) does not require counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified to examine the witness as if under redirect examination if the party who called the witness for examination under this section:

(1) Is also a person identified with the same party with whom the witness is identified.

(2) Is the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified.

Comment. Section 776 permits a party calling as a witness an employee of (or someone similarly identified in interest with) an adverse party to examine the witness as if under cross-examination, *i.e.*, to

use leading questions in his examination. Section 776 requires the party whose employee was thus called and examined to examine the witness as if under redirect examination, *i.e.*, to refrain from the use of leading questions. If a party is able to persuade the court that the usual rule prescribed by Section 776 is not in the interest of justice in a particular case, the court may enlarge or restrict the right to use leading questions as provided in Section 767.

These rules are based on the premise that ordinarily such a witness will have a feeling of identification in the lawsuit with his employer rather than with the other party to the action.

Subdivision (b) has been amended, and subdivision (e) has been added, because the premise upon which Section 776 is based does not necessarily apply when the party calling the witness is also closely identified with the adverse party; hence, the adverse party should be entitled to the usual rights of a cross-examiner when he examines the witness. For example, when an employee sues his employer and calls a co-employee as a witness, there is no reason to assume that the witness will be adverse to the employee-party and in sympathy with the employer-party. The reverse may be the case. The amendment to Section 776 will permit an employer, as a general rule, to use leading questions in his cross-examination of an employee-witness who has been called to testify under Section 776 by a co-employee. However, if the party calling the witness can satisfy the court that the witness is in fact identified in interest with the employer or for some other reason is amenable to suggestive questioning by the employer, the court may limit the employer's use of leading questions during his examination of the witness pursuant to Section 767. See *J. & B. Motors, Inc. v. Margolis*, 75 Ariz. 392, 257 P.2d 588, 38 A.L.R. 2d 946 (1953).

Evidence Code Section 952 (amended)

SEC. 4. Section 952 of the Evidence Code is amended to read:

952. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes *a legal opinion formed and the* advice given by the lawyer in the course of that relationship.

Comment. The express inclusion of "a legal opinion" in the last clause will preclude a possible construction of this section that would leave the attorney's uncommunicated legal opinion—which includes his impressions and conclusions—unprotected by the privilege. Such a construction would virtually destroy the privilege.

Evidence Code Section 992 (amended)

SEC. 5. Section 992 of the Evidence Code is amended to read:

992. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes *a diagnosis made and the* advice given by the physician in the course of that relationship.

Comment. The express inclusion of "a diagnosis" in the last clause will preclude a possible construction of this section that would leave an uncommunicated diagnosis unprotected by the privilege. Such a construction would virtually destroy the privilege.

Evidence Code Section 1012 (amended)

SEC. 6. Section 1012 of the Evidence Code is amended to read:

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or examination or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination, and includes *a diagnosis made and the* advice given by the psychotherapist in the course of that relationship.

Comment. The express inclusion of "a diagnosis" in the last clause will preclude a possible construction of this section that would leave an uncommunicated diagnosis unprotected by the privilege. Such a construction would virtually destroy the privilege.

Evidence Code Section 1017 (amended)

SEC. 7. Section 1017 of the Evidence Code is amended to read:

1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request

of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter *or withdraw* a plea based on insanity or to present a defense based on his mental or emotional condition.

Comment. The words "or withdraw" are added to Section 1017 to make it clear that the psychotherapist-patient privilege applies in a case where the defendant in a criminal proceeding enters a plea based on insanity, submits to an examination by a court-appointed psychotherapist, and later withdraws the plea based on insanity prior to the trial on that issue. In such case, since the defendant does not tender an issue based on his mental or emotional condition at the trial, the privilege should remain applicable. Of course, if the defendant determines to go to trial on the plea based on insanity, the psychotherapist-patient privilege will not be applicable. See Section 1016.

It should be noted that violation of the constitutional right to counsel may require the exclusion of evidence that is not privileged under this article; and, even in cases where this constitutional right is not violated, the protection that this right affords may require certain procedural safeguards in the examination procedure and a limiting instruction if the psychotherapist's testimony is admitted. See *In re Spencer,* 63 Cal.2d 400, 46 Cal. Rptr. 753, 406 P.2d 33 (1965).

It is important to recognize that the attorney-client privilege may provide protection in some cases where an exception to the psychotherapist-patient privilege is applicable. See Section 952 and the *Comment* thereto. See also Sections 912(d) and 954 and the *Comments* thereto.

Evidence Code Section 1152 (amended)

SEC. 8. Section 1152 of the Evidence Code is amended to read:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained *or will sustain* or claims ~~to have~~ *that he has* sustained *or will sustain* loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his preexisting debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his preexisting duty.

Comment. The amendment to Section 1152 is intended to clarify the meaning of the section without changing its substantive effect. The

words "or will sustain" have been added to make it clear that the section applies to statements made in the course of negotiations concerning future loss or damage as well as past loss or damage. Such negotiations might occur as a result of an alleged anticipatory breach of contract or as an incident of an eminent domain proceeding.

Evidence Code Section 1201 (amended)

SEC. 9. Section 1201 of the Evidence Code is amended to read:

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence *of such statement* is hearsay evidence if ~~the~~ *such* hearsay evidence ~~of such statement~~ consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

Comment. This amendment is designed to clarify the meaning of Section 1201 without changing its substantive effect.

Evidence Code Section 1600 (amended)

SEC. 10. Section 1600 of the Evidence Code is amended to read:

1600. *(a)* The ~~official~~ record of ~~a~~ *an instrument or other* document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

~~(a)~~ *(1)* The record is in fact a record of an office of a public entity; and

~~(b)~~ *(2)* A statute authorized such a document to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Comment. One effect of making the official record "prima facie evidence" is to create a rebuttable presumption. See EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). The classification of this presumption as one affecting the burden of proof is consistent with the prior case law. See *Thomas v. Peterson*, 213 Cal. 672, 3 P.2d 306 (1931); *DuBois v. Larke*, 175 Cal. App.2d 737, 346 P.2d 830 (1959); *Osterberg v. Osterberg*, 68 Cal. App.2d 254, 156 P.2d 46 (1945). Such a classification tends to support the record title to property by requiring that the record title be sustained unless the party attacking it can actually prove its invalidity. See EVIDENCE CODE § 606 and *Comment* thereto.

The word "official," which modified "record," has been deleted as unnecessary in light of the requirements of paragraphs (1) and (2) of subdivision (a).

Evidence Code Section 1602 (repealed)

SEC. 11. Section 1602 of the Evidence Code is repealed.

~~1602. If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.~~

Comment. Section 1602 of the Evidence Code is repealed because it is superseded by the addition of Section 2325 to the Public Resources Code.

Evidence Code Section 1603 (amended)

SEC. 12. Section 1603 of the Evidence Code is amended to read:

1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. *The presumption established by this section is a presumption affecting the burden of proof.*

Comment. One effect of Section 1603 is to create a rebuttable presumption. See EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.").

Prior to the enactment in 1911 of Code of Civil Procedure Section 1928 (upon which Section 1603 of the Evidence Code is based), the recitals in a sheriff's deed, made pursuant to legal process, could not be used as evidence of the judgment, the execution, and the sale upon which the deed was based. The existence of the prior proceedings were required to be proved with independent evidence. *Heyman v. Babcock*, 30 Cal. 367, 370 (1866); *Hihn v. Peck*, 30 Cal. 280, 287–288 (1866). The enactment of the predecessor of Evidence Code Section 1603 had two effects. First, it obviated the need for such independent proof. See, *e.g.*, *Oakes v. Fernandez*, 108 Cal. App.2d 168, 238 P.2d 641 (1951); *Wagnor v. Blume*, 71 Cal. App.2d 94, 161 P.2d 1001 (1945). See also BASYE, CLEARING LAND TITLES § 41 (1953). Second, it obviated the need for proof of a chain of title prior to the execution of the deed. *Krug v. Warden*, 57 Cal. App. 563, 207 Pac. 696 (1922).

The classification of the presumption in Section 1603 as a presumption affecting the burden of proof is consistent with the classification of the similar and overlapping presumptions contained in Evidence Code Sections 664 (official duty regularly performed) and 1600 (official record of document affecting property). Like the presumption in Section 1600, the presumption in Section 1603 serves the purpose of supporting the record chain of title.

Evidence Code Section 1605 (amended)

SEC. 13. Section 1605 of the Evidence Code is amended to read:

1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in the state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865–66, are ~~receivable as prima facie evidence~~ *admissible as evidence* with like force and effect as the originals and without proving the execution of such originals.

Comment. Chapter 281 of the Statutes of 1865-66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865-66 statute, which is now codified as Section 1605 of the Evidence Code, provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule—which would have required production of the original or an excuse for its nonproduction before the recorded copy could be admitted—and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy. Section 1605, therefore, has been revised to reflect this original purpose.

Public Resources Code Section 2325 (new)

SEC. 14. Section 2325 is added to the Public Resources Code, to read:

2325. If a patent for mineral lands within this state issued or granted by the United States of America contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location. The presumption established by this section is a presumption affecting the burden of producing evidence.

Comment. Section 2325 is based on former Section 1602 of the Evidence Code, which merely restated the provisions of former Section 1927 of the Code of Civil Procedure. The language of the section, that a location date recited in a patent is "prima facie evidence" of the actual location date, establishes a rebuttable presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is

prima facie evidence of another fact establishes a rebuttable presumption.").

Under Section 2325, this presumption is classified as a presumption affecting the burden of producing evidence. Therefore, a location date recited in a United States patent for mineral lands will conclusively establish the date of the location of the claim on which the patent is based unless the adverse party produces some evidence that the recited date is incorrect. If there is evidence that the recited date is incorrect, the presumption vanishes and plays no further role in the disposition of the case. See EVIDENCE CODE § 604 and the *Comment* thereto.

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